In the Supreme Court of the United States

October Term, 1976
No. 76-1520

ROBERT HENRY,
and HELEN HENRY, h/w
Petitioner

vs.

UNITED OVERSEAS MARINE CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Robert Henry, respectfully prays that a writ of certiorari be issued to review the judgment without a full opinion of the United States Court of Appeals for the Third Circuit, entered on January 6, 1977, rehearing denied February 2, 1977.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit rendered its judgment order affirming the decision of the court below on January 6, 1977 (2a). Petition for rehearing en banc was denied on February 2, 1977 (1a). The opinion in the District Court was rendered orally from the bench on March 12, 1976 (5a). However, since the affirmation on appeal, shipowner's counsel has requested that the District Court publish its opinion, which said Court has agreed to do.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

Where the facts are undisputed and Respondent concedes that Petitioner would have prevailed under pre-33 U.S.C.A. §905(b) maritime negligence law pursuant to *Gutierrez vs. Waterman Steamship Corp.*, 373 U.S. 206 (1963), and *Ferrante vs. Swedish American Lines*, 331 F.2d 571 (3rd Cir. 1964), should not the Supreme Court grant certiorari now to decide the following important questions of Federal law:

1. Since §905(b) authorizes a negligence remedy against the vessel "in accordance with . . . §33," and Congress reenacted §33(a) and (i) without amendment, did Congress intend to preserve and continue intact pre-amendment maritime negligence law, as developed by the Federal Courts, or to preserve some but not all of pre-amendment law, or to preserve none of it?

2. Does the lower courts' rejection of the *Gutierrez-Ferrante* standard of care further or thwart a paramount objective of Congress in enacting §905(b) of promoting safety in the hazardous longshoring industry?

3. Do repeated Congressional statements, that §905(b) will place the harbor worker and the vessel on the same footing as an employee and a land-based third party, mean that the vessel would only be liable when it is at fault, or is it also a mandate to the Federal Courts to develop a new standard of care for vessel owners by adopting land-based negligence principles which were previously found repugnant to maritime negligence law?

STATUTORY PROVISIONS INVOLVED

1. 33 U.S.C.A. §905 (b):

In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

2. 33 U.S.C.A. §933 (a):

If an account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other

than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

3. 33 U.S.C.A. §933 (i):

(i) The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

STATEMENT OF THE CASE

This diversity personal injury action was brought by Robert Henry, a longshoreman, against a foreign shipowner and it is governed by maritime law. On March 12, 1976, the action, by agreement, proceeded as though a jury had been impaneled, with plaintiff resting after introducing into evidence the parties' stipulation and supplemental stipulation of facts. Shipowner then moved for a directed verdict under F.R.C.P. 50. The parties had agreed that if the Court denied the motion, then judgment would be entered for Henry by agreement in the amount of $30,000. The Court, however, granted the motion. At the same time, the Court rendered its opinion from the bench. Judgment was entered in favor of the shipowner, which was later affirmed by the Court of Appeals for the Third Circuit.

On February 28, 1973, Robert Henry, a longshoreman, was employed by Northern Metal Company, a stevedoring company, along with other longshoremen, to discharge cargo from the shipowner's vessel, the SS Pacific Breeze. Henry and the other members of his gang were assigned to work in the vessel's No. 3 lower tween-deck. The cargo discharge operation was pursuant to permission and authority of the shipowner and by virtue of a contract between the stevedore and the vessel's time charterer.

The cargo to be discharged from the No. 3 tween-deck consisted of crates of plywood which were first unloaded and bales of hemp. The bales of hemp weighed approximately 275 pounds each and were stowed in the forward part of the hatch and continued aft along approximately one-quarter of the coaming on both sides so that the stow was in a "U" shape. The hemp was stowed 7 or 8 bales high and the entire stow was 14 to 16 feet off the deck.

The longshoremen commenced to discharge the hemp at about 10:10 a.m. The actual discharge of the hemp had been in progress for approximately 3½ hours prior to Henry's accident. During that time period, the longshoremen used the same equipment and followed the same method of discharge. The equipment used in the discharge consisted of the vessel's winches, for which the ship supplied the power, the vessel's booms and runners, and the stevedore's bale hooks.

The longshoremen were not supplied any staging to do their work. Therefore, since they were unable to reach the top of the stow, they placed their bale hooks in the bales on the face or front of the stow as high as possible. The bale hooks were then attached to the ship's booms and runners, and the ship's winches pulled the bales from the stow and out of the hatch. By discharging in this way, bales which remained in the stow were caused to shift and/or fall. This method of discharge was authorized and approved by Northern Metal's gang boss and ship boss, but not by its stevedoring superintendent.

Prior to Henry's accident, the vessel's chief mate and third mate made periodic inspections of the cargo operation in the No. 3 lower tween-deck. Prior to Henry's accident, the chief mate and third mate had *actual knowl-*

edge that the method being used to discharge the hemp was not reasonably safe. Prior to Henry's accident, the chief mate and third mate had *actual knowledge* of the reasonably safe method of discharge of the hemp, i.e., discharge the hemp from the very top tier down. Northern Metal's stevedoring superintendent, who was the ship and gang bosses' supervisor, also had this knowledge.

Nonetheless, at no time prior to Henry's accident did the chief mate or third mate stop the discharge by cutting off the power to the vessel's winches until the method of discharge was made reasonably safe or take any other corrective action, such as warning the stevedoring superintendent that the method of discharge that was continually being used was not reasonably safe.

Henry was injured at about 2:30 p.m. when bales of hemp fell from the stow and struck him.

Henry's accident occurred subsequent to the 1972 enactment of §905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901, *et seq.* (LHWCA).

The District Court held that this amendment altered pre-existing general maritime negligence law; that Congress did not intend to make a vessel owner liable for failure to take any corrective action when he knows of a stevedore's improper method of operation except only when the shipowner has exercised control over the manner or method of doing the work.

The Third Circuit's judgment order which affirmed the District Court specifically cited those portions of the lower court's opinion, turning on control over the manner or method of doing the work, as well as a prior 33 U.S.C.A. §905(b) decision in *Brown vs. Ivarans Rederi A/S*, 545 F.2d 854 (3rd Cir. 1976), petition for cert. filed 2/26/77, No. 76-1182.

The courts below rejected Petitioner's contentions that (1) the negligence standard set forth in *Gutierrez vs. Waterman Steamship Corp.*, 373 U.S. 206 (1963), and followed in *Ferrante vs. Swedish American Lines*, 331 F.2d 571 (3rd Cir. 1964), were still applicable after the 1972 enactment of §905(b); (2) Congress did not intend to overrule or replace the *Gutierrez-Ferrante* negligence standard by the enactment of the 1972 Amendments to the LHWCA, since that negligence standard furthered a paramount Congressional objective of promoting safety in the hazardous longshoring industry; (3) in enacting the 1972 Amendments to the LHWCA, Congress recognized, endorsed and preserved the pre-existing judicial methodology in developing maritime negligence principles.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court Should Grant Certiorari To Resolve Important Questions of Federal Law Posed by the 1972 Enactment of 33 U.S.C.A. §905(b)

A. Pre-Amendment Law—A Brief Summary:

Prior to the 1972 enactment of §905(b), this Court had evolved two distinct bases for harbor workers and seamen to recover damages under maritime tort law. One was unseaworthiness, the other was negligence. Initially, in 1903, the unseaworthiness remedy, liability without fault, was held available to seamen. In 1920, through the passage of the Jones Act, a negligence remedy, liability based on fault, was provided for seamen. In 1926, this Court held that the Jones Act negligence remedy also was available for longshoremen. Six months thereafter, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) was enacted, with its exclusive liability provision granted to the stevedore, the longshoreman's employer. The longshoreman's right to sue third parties, including shipowners, was left unimpaired.

In 1946, this Court held that the unseaworthiness remedy, available to seamen, was also available to longshoremen. From 1946 to 1972, this Court has held that both seamen and longshoremen, who do work traditionally done by seamen, are entitled individually

and/or jointly, to the unseaworthiness and negligence remedy against the shipowner. During the same time period, this Court also has held that the shipowner was entitled, in most instances, to recover full indemnity from the stevedore so that the stevedore in effect bore the cost of the longshoreman's damages, notwithstanding the exclusive liability provision of the LHWCA.

These developments led to a substantial number of maritime tort cases, to be filed and decided by the Federal Courts. However, decisions based on the negligence/fault remedy were relatively sparse in comparison with the unseaworthiness/no-fault remedy, which was a less burdensome basis for recovery. For a full history with citations and discussion of these developments, see Gilmore and Black, *The Law of Admiralty*, 2d Ed., pp. 272-280, 436-448 (1975).

In *Kermerac vs. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959), an action based on maritime negligence, this Court held that:

> . . . the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interest, the duty of exercising reasonable care under the circumstances of each case.

Subsequently, in *Gutierrez vs. Waterman Steamship Corp.*, 373 U.S. 206 (1963), this Court, in a longshoreman's maritime negligence case, held in an 8-1 decision and opinion by Mr. Justice White that a shipowner's duty of care required the shipowner to take corrective action when it knew of the stevedore's unsafe method of op-

eration. The Third Circuit Court of Appeals followed this precedent without any deviation based on factual distinctions, *Ferrante vs. Swedish American Lines*, 331 F.2d 571 (3rd Cir. 1964). In fact, decisions in the Third Circuit had recognized this duty of care prior to the Supreme Court's decision in *Gutierrez, supra*. See *Knox vs. United States Lines*, 294 F.2d 354 (3rd Cir. 1961); *Fisher vs. United States Lines Co.*, 198 F. Supp. 815 (E.D. Pa. 1961). Moreover, the development of this negligence standard reflected the ongoing judicial process of creativity and flexibility in the development of a uniform maritime tort law by adopting and/or modifying accepted principles of land-based law relating to duties arising from special relationships between parties.[1] See *Restatement (2d) of Torts*, §§314A, B, 315, 318, 344; *Restatement of Torts*, §344; Harper & Kime, *The Duty To Control the Conduct of Another*, 43 Yale L.J. 886 (1933-34). No Federal Court, during the pre-1972 Amendment era, however, adopted or incorporated into maritime negligence law land-based principles of negligence law applicable to landowners such as stated in *Restatement (2d) of Torts*, §§342, 343, 343A.

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[1] In *West vs. United States*, 361 U.S. 118 (1959), this Court held that a shipowner whose vessel was out of navigation, has a duty to provide a shipyard worker with a safe place to work only when the shipowner had control over the ship *or* control over the repair work done. The *West* holding did not deter this Court from its subsequent ruling in *Gutierrez, supra*, since during cargo operations, a vessel is in navigation and the shipowner is in control of its vessel. Moreover, a basis for a special relationship between a longshoreman/harbor worker and the vessel owner exists because of the ship's officer's expertise in cargo operations, which does not exist in shipyard repair operations.

Prior to the 1972 enactment of §905(b), Petitioner would have at least been entitled to a jury determination of his claim and would have prevailed in view of the parties' stipulation. The shipowner recognized and conceded this in the courts below. The shipowner contended in the courts below that the enactment of §905(b) resulted in the Congressional overruling of *Gutierrez vs. Waterman Steamship Corp., supra*, and its progeny. The courts below have agreed with this contention.

B. §905(b) and Post-Amendment Law—The Unanswered Questions:

Section 905(b) provides for:

(1) a remedy against the vessel (owner) for injury caused by negligence;

(2) an elimination of the warranty of seaworthiness;

(3) an elimination of the vessel's (owner's) right of indemnity against the stevedore.

The Congressional discussion of these three aspects of §905(b) are exactly the same in the Senate Report, No. 92-1125, September 14, 1972, and the House Report, No. 92-1441, September 25, 1972, 1972 U.S. Code Cong. & Adm. News 4698, *et seq.* It is lumped together under one heading, "Elimination of Unseaworthiness Remedy," 1972 U.S. Code Cong. & Adm. News 4701-05.

Section 905(b) and its legislative history raises at least these significant federal questions which remain unanswered by this Court:

(1) Since §905(b) authorizes a negligence remedy against the vessel "in accordance with . . . §33," and Congress reenacted §33(a) and (i) without amendment, did Congress intend to preserve and continue intact pre-amendment maritime negligence law, as developed by the Federal Courts, or to preserve some but not all of pre-amendment law, or to preserve none of it?

(2) Does the lower courts' rejection of the *Gutierrez-Ferrante* standard of care further or thwart a paramount objective of Congress in enacting §905(b) of promoting safety in the hazardous longshoring industry?

(3) Do repeated Congressional statements, that §905(b) will place the harbor worker and the vessel on the same footing as an employee and a land-based third party, mean that the vessel would only be liable when it is at fault, or is it also a mandate to the Federal Courts to develop a new standard of care for vessel owners by adopting land-based negligence principles which were previously found repugnant to maritime negligence law?

(4) Under §905(b), are the negligence standards applicable to longshoremen the same as those standards applicable to seamen?

(5) In eliminating the vessel's right to indemnity, did Congress intend to narrow the vessel's duty to exercise reasonable care?

Questions 1, 3 and 4 are related. Among the Courts of Appeals which have passed upon the negligence stan-

dard of care issue, all of them, Second, Third, Fourth and Fifth Circuits, have held that §905(b) creates a new negligence action.[2] *Napoli vs. Hellenic Lines Ltd.*, 536 F.2d 505 (2nd Cir. 1976); *Brown vs. Ivarans Rederi A/S*, 545 F.2d 854 (3rd Cir. 1976); *Anuszewski vs. Dynamic Mariner Corp., Panama*, 540 F.2d 757 (4th Cir. 1976); *Gay vs. Ocean Transport and Trading, Ltd.* and *Guerra vs. Bulk Transport Corp., et al.*, 546 F.2d 1233 (5th Cir. 1977).

The Second, Fourth and Fifth Circuits, in reaching this conclusion, have relied primarily on a statement in the Congressional Reports that for the vessel to be liable, it must act "in a negligent manner such as would render a land-based third party in nonmaritime pursuits liable under similar circumstances." 1972 U.S. Code Cong. & Adm. News 4704. Of all the generally accepted land-based negligence principles available to the Second, Fourth and Fifth Circuits, they have opted for the restrictive land-based principles applicable to owners and possessors of land. No reason or logic or policy is given for this choice. In the name of uniformity, the *Restatement* (2d) *of Torts*

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[2] Prior to the Circuit Courts' decisions, most District Courts' decisions also held that §905(b) created a new negligence action. Two District Courts, however, have held that §905(b) did not create a new negligence action, *Slaughter vs. S. S. Rondo, et al.*, 390 F. Supp. 637, 640 (S.D. Ga. 1974), and *Giacona vs. Capricorn Shipping Co.*, 394 F. Supp. 1189, 1192-94 (S.D. Tex. 1975). See Robertson, David W., *Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 7 Journal of Maritime Law and Commerce 447 (April, 1976), where the author effectively reviews and analyzes all post-§905(b) litigaiton throughout the country to the date of publication.

has been utilized by these courts as a statement of the applicable legal principles.

The Fourth Circuit has opted for §343. The Second Circuit has rejected §343 and has chosen §343A. The Fifth Circuit has selected §§342, 343 and 343A, with an indicated preference for §343A. However, that Circuit has held that §343A is not applicable when the danger is initially created by the stevedore, since this is not the type of danger the longshoreman must face, notwithstanding knowledge, *Guerra vs. Bulk Transport Corp., et al., supra,* p. 1242. This conclusion is contrary to the poignant description of the longshoreman's plight in *Ballwanz vs. Isthmian Lines, Inc.,* 319 F.2d 457, 462 (4th Cir. 1963), where the Court stated:

> The plaintiff was one of a gang of eight longshoremen working in the hold of the defendant ship. He had no responsibility for, or authority over, any of his fellow workers. His duty was to do his work as he was instructed. He was in no sense obligated to protest against the method of operation which he had been instructed to follow or to devise a safer method, nor was he obligated to call for additional or different equipment.

The opinions of these Circuits do not consider or discuss whether such negligence standards further Congress' intention to promote safety. The opinions of these Circuits do not consider that, historically, the Federal Courts in the development of maritime tort law prior to the enactment of §905(b) incorporated recognized land-based negligence principles, but never had adopted the restrictive negligence standards applicable to landowners because of

their assumption of risk underpinning. See *Gutierrez vs. Waterman Steamship Corp., supra; Ferrante vs. Swedish American Lines, supra; Fisher vs. United States Lines Co., supra; Lindsay, Executrix vs. McDonnell Douglas Aircraft Corporation,* 460 F.2d 631 (8th Cir. 1972). Moreover, these opinions do not consider pre-§905(b) maritime negligence decisions by this Court on the assumption that §905(b) wiped the slate clean. There is also an implicit rejection without discussion or analysis of the cogent position taken by the respected legal writers, Gilmore and Black, that the negligence standards under §905(b) should be the same as those applicable to seamen, Gilmore and Black, *The Law of Admiralty,* 2d Ed., pp. 453-455.

The Third Circuit has taken a different route. It has rejected §343A because of its assumption of risk underpinning, *Brown vs. Ivarans Rederi A/S, supra,* pp. 863-864. In *Brown, supra,* the Court held that pre-Amendment maritime negligence law continues to govern the longshoreman's negligence action against the vessel, so long as such pre-amendment legal principles are not inconsistent with §905(b). The Court suggested and later held in *Marant vs. Farrell Lines, Inc.,* No. 76-1383 (3rd Cir. 1977), opinion reproduced in *Brown vs. Ivarans Rederi A/S,* petition for cert. No. 76-1182, that the Occupational Safety and Health Act of 1970, 29 U.S.C.A. §651, *et seq.,* and the longshoring safety regulations thereunder, which were a part of the pre-§905(b) maritime law, mandated in the post-§905(b) era that the major responsibility for the safe conduct of the work be borne by the stevedore.[3]

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[3] However, reliance on OSHA to effectively enforce safety regulations and enforce accident prevention measures by the

Thus, the vessel's potential liability was narrowed when the stevedore's negligence was a contributing cause of the accident. In Petitioner's case, the Court extended this principle and held that where the stevedore is initially negligent, the vessel, despite actual knowledge and ability to take corrective action, has no duty to exercise reasonable care.[4]

In Petitioner's case, neither the District Court nor the Court of Appeals, which cited *Brown, supra,* analyzed or discussed why their rejection of the *Gutierrez-Ferrante* duty was mandated by §905 (b), or why and how this duty was inconsistent with §905 (b).

Thus, the Third Circuit, along with the Fourth and Fifth Circuits, have answered Question (2) and related

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stevedore is being undermined at another level. Recent judicial developments hamper OSHA's investigatory power, holding that inspections without a warrant, pursuant to OSHA regulations, are a violation of the Fourth Amendment, *Barlow's, Inc. vs. Usery,* 424 F. Supp. 437 (D. Idaho 1976), probable jurisdiction noted April 18, 1977, No. 76-1143. For the longshoreman, it looks like Catch-22.

[4] In affirming the District Court, the Court of Appeals held that a vessel's duty of care would exist if it exercised control over the stevedore's work method. This, too, is a recognized land-based negligence principle. See *Restatement* (2d) *of Torts,* §414. However, the District Court, with the implicit approval of the Court of Appeals, opted for *Restatement* (2d) *of Torts,* §414, com. c's, rather than com. a's, description of control. These comments are contradictory. Under com. a, Henry would be entitled to a jury determination of the "control" issue, and under com. c, he would not. Moreover, where the duty of care arises from a special relationship such as the *Gutierrez-Ferrante* duty, the control required is over the premises or the chattel generally, and not the specific details of the work being done.

Question (5) above. Without discussion or analysis, those Circuits have concluded that the *Gutierrez-Ferrante* standard of care was inconsistent with and thwarted a paramount Congressional objective of promoting safety in the hazardous longshoring industry. The development of an important body of Federal law should not be permitted to stand on such misguided and unspoken foundations. The *Gutierrez-Ferrante* duty of care does promote safety. It is not inconsistent with §905 (b). The following analysis will substantiate these conclusions.

Shipowners (in an amici brief filed below) argued that to expose them to liability for negligence under Petitioner's circumstances results in removing the incentive for the stevedore to be safe and, in fact, encourages the stevedore to engage in unsafe practices. The heart of this argument lies in the Congressional enactment which insulates the stevedore from any liability to the shipowner arising from the shipowner's liability to the longshoreman. Shipowners initially attempted to convince the courts that concurrent negligence principles should not apply under the Amendments. Shipowners argued that it would be manifestly unfair to require them to pay one hundred per cent of the damages when they were not one hundred per cent at fault and the stevedore was not only not required to contribute, but was reimbursed its compensation payments from the recovery made from the shipowner. The courts have thus far uniformly rejected this argument.

The shipowners have now turned this argument to attempt to convince the courts to interpret the 1972 Amendments to place a very narrow burden or duty upon them to exercise reasonable care. They now argue that to hold the shipowner and the stevedore concurrently neg-

ligent under Petitioner's facts would result in a windfall to the stevedore and destroy the stevedore's incentive to eliminate dangerous conditions or practices which the stevedore has created aboard the vessel. The effect of this argument would be to leave exclusively to the stevedore the responsibility for eliminating such conditions.[5]

When the 1972 Amendments are viewed against pre-1972 Amendment history, it is evident that Congress did not intend to leave that responsibility exclusively to the stevedore. Prior to the 1972 Amendments, the law, through the "Ryan"[6] bridge, created a greater economic incentive on the stevedore to avoid unsafe and dangerous work practices than presently exists under the 1972 Amendments. Prior to the 1972 Amendments, the stevedore was liable not only for compensation, but was also liable to fully indemnify the shipowner who was liable to a longshoreman under the *Gutierrez-Ferrante* doctrine of negligence. Despite this economic incentive, high injury frequency rates persisted and escalated in the longshoring industry.[7]

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[5] The loss from avoidable unsafe methods employed by the stevedore would then be allocated between the stevedore and the longshoreman. Here, as in any compensation system, the injured employee bears part of the cost for injuries caused by avoidable unsafe practices, i.e., loss of one-third earnings, loss of recovery for physical and mental pain and suffering.

[6] *Ryan Stevedoring Co. vs. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

[7] Longshoring has long been recognized as an extremely hazardous occupation. The injury statistics cited by Justice Douglas in his dissent in *Victory Carriers, Inc. vs. Law*, 404 U.S. 202, 218 (1971), revealed 92.3 accidents per million man hours worked, indicating that a stevedoring employee who works fairly regularly can expect an accident roughly every five years. Concerned about the high longshoring accident rate, the Occupational Health and Safety Administration (OSHA), which administers the maritime safety program, commissioned a private consulting firm, Cooper and Company, to conduct a research study of the longshoring industry. According to that report, in 1971, the lost time injuries per million employee hours increased to 71.1, as compared to 69.1 in 1970, Cooper and Company Longshoring Study Report, Feb. 5, 1976.

At the same time, the accident prevention incentive of the *Gutierrez-Ferrante* negligence doctrine on the shipowner was completely diluted by the "Ryan" bridge. This occurred because the shipowner could recoup all losses from the stevedore resulting from the shipowner's failure to act reasonably to prevent unsafe stevedore work practices or conditions of which the shipowner knew or should have known.

In view of the above, the following realities existed prior to the 1972 Amendments:

1. The economic and coercive incentives to eliminate unsafe working conditions by the stevedore was in fact exclusively on the stevedore.

2. The exposure of the shipowner for negligence as an incentive for him to correct unsafe stevedore work conditions involving ship's equipment, of which he knew or should have known, was ineffectual because of the shipowner's right to indemnity.

3. There existed countervailing factors or incentives which negated the cost savings incentive of accident reduction for the stevedore, such as graphically detailed in a section of the Cooper and Company Federally-funded

study of the longshoring industry. The negative incentives cited by the report include the push for higher productivity and shorter loading time, since stevedoring time is considered dead time. Thus, shipping company operators have economic pressures to have loading and unloading conducted as quickly as possible, which results in cutting corners and taking chances. The study also noted that there are negative incentives on management operating against accident reduction measures, despite the high insurance premiums and high cost of accidents. These factors include the fact that stevedores and shipping companies are closely linked and that often, owners of shipping companies also own the stevedores, and/or that many shipping companies do their own stevedoring.

It is against this background of the 1972 Amendments that the following Congressional statement[8] must be measured, 1972 U.S. Code Cong. & Adm. News at 4704:

> Thus, nothing in the bill is intended to derogate from the vessel's responsibility to take appropriate corrective action when it knows or should have known about a dangerous condition.

The 1972 Amendments encompass more than compromises to allocate the cost of longshore injuries between the longshoreman, the shipowner and the stevedore. The elimination of the shipowner's right of indemnity from the stevedore now creates a meaningful economic incen-

[8] Congress has also stated: ". . . it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of unseaworthiness . . . ." 1972 U.S. Code Cong. & Adm. News at 4703.

tive for the shipowner, through its officers who are trained in cargo operations safety,[9] to participate in accident prevention when it knows or should know of a stevedore's unsafe or dangerous work practice or condition, which involves ship's equipment, since otherwise the shipowner alone will bear the total cost of the loss.

Moreover, this incentive also results in giving the shipowner the motivation to maintain an ongoing business relationship with the stevedore who follows safe work practices with the resultant reduced accident probability. Such a stevedore will thus reduce the likelihood of the shipowner bearing the cost of the loss, as well as the cost necessary to defend any claim against the shipowner.

The argument made by the shipowners that carrying forward the *Gutierrez-Ferrante* doctrine of negligence into the 1972 Amendment era would create an incentive for the stevedore to adopt unsafe practices is unrealistic. To

[9] For example, the Merchant Marine Academy in Kings Point, New York, was established in 1943 under the Maritime Administration of the Department of Commerce. It offers a four-year undergraduate program to prepare and train deck and engineering officers. In the catalogue for 1975-1976, courses in cargo are listed as mandatory for those students pursuing the nautical science curriculum, the course of study which prepares deck officers. U. S. Merchant Marine Academy, Catalogue 1975-1976 at 28, 32. The course descriptions indicate that safety in cargo operations and mathematics of cargo stowage to fulfill principles of cargo handling are included. *Id.* at 47. The Catalogue also states that "(d)eck officers are responsible for the safe navigation of the vessel, loading and discharge of cargo, vessel maintenance and shipboard safety." *Id.* at 50. The curriculum is thus designed to train deck officers in cargo safety to enable them to accept and fulfill their professional responsibilities.

the contrary, the *Gutierrez-Ferrante* doctrine of negligence gives to the stevedore these additional incentives to act initially in a safe manner beyond the cost of compensation and the OSHA regulations:

1. A stevedore will know that if it engages in unsafe work practices aboard a vessel, that it will likely be stopped and subject to economic loss by payment to the shipowner for his loss sustained by a work stoppage for this reason.[10]

2. A stevedore will know that it is subject to lose the business of a shipowner who is exposed to liability as a result, in part, of the stevedore's unsafe work practices.

These factors clearly nullify the questionable negative incentive which may come from the windfall recoupment by the stevedore of compensation payments[11] under these circumstances.

Congress clearly intended to provide job safety incentives to both the stevedore and the shipowner as to

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[10] In *Teofilovich vs. d'Amico Mediterranean/Pacific Line*, No. CV 75-1269 (C.D. Cal. June 11, 1976), the Court noted at p. 13 that: ". . . if a condition is found which is unsafe for the professional longshoremen, as a rule the contractor can remedy it at the expense of the shipowner; that if the stevedoring operations are thereby delayed, the shipowner normally must pay for standby time . . . ." If, as the *Teofilovich* court recognized, the stevedore may charge the shipowner for idle standby time resulting from unsafe conditions aboard created by the vessel, then conversely, the vessel can remedy unsafe stevedoring methods in a similar fashion—by providing by contract that they will be remedied at the stevedore's expense and that the stevedore must bear the economic brunt of any delays thus occasioned.

[11] It is uncertain whether the repayment of past compensation benefits in any way affects future compensation insurance rates. There is nothing in this record which indicates this.

the manner that the stevedore performed its work aboard a vessel which involves the use of ship's equipment. These incentives would operate together to increase accident prevention activities and promote safety for longshoremen in the following manner. Initially, the stevedore would be exposed to the job safety incentives affecting it. If those job safety incentives did not result in a safe method of work involving ship's equipment, then the second line of defense against avoidable accidents to longshoremen would then come into play through the safety incentives which affect a shipowner through its officers who are knowledgeable in cargo operations safety, when they know or should know of the stevedore's unsafe work method involving ship's equipment.

The *Gutierrez-Ferrante* duty of care, if imposed on the shipowner pursuant to §905(b), would therefore, carry out a paramount Congressional objective of requiring both the stevedore and the shipowner to become involved in accident prevention by providing each with appropriate incentives to do so.

C. Why Certiorari in This Case:

This Court should exercise jurisdiction in Petitioner's case because it is an appropriate one in which to decide some, if not all, of the important Federal law questions discussed above.

In Petitioner's case, the facts are not in dispute. Respondent has conceded that, under the pre-amendment maritime negligence law, Petitioner would prevail. Thus, Petitioner's case places sharply into focus several of the questions posed by the enactment of §905(b).

Moreover, a decision in this case, irrespective of the result, will terminate this litigation without any further extensive judicial proceedings. On the assumption that this Court will eventually address itself to the questions raised here, judicial economy will thus be promoted by this Court's exercise of jurisdiction under these circumstances.

Nearly 4½ years have elapsed since §905(b) became law. In that time period, it has been determined that since OSHA's inception, and continuing into the post-§905(b) era, the injury frequency rate for longshoring has not substantially changed.[12]

During this time period, the Courts of Appeals and the District Courts have continued to be flooded with litigation to resolve issues posed by §905(b). These courts have agreed on some issues, disagreed on others, and have reached results on other issues without discussion or analysis. It would be appropriate for this Court now to exercise its jurisdiction over this case to give guidance to persons affected by §905(b) and to the lower Federal Courts, as well as to make certain that the Federal Courts fulfill Congress' intent and objectives in enacting §905(b).

Respectfully submitted,
MORRIS M. SHUSTER,
MYRA B. JOSEPHSON,
Attorneys for Petitioner.

700 Widener Building,
Philadelphia, PA 19107

[12] Cooper and Company Longshoring Study Report, February 5, 1976.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1618

Helen Henry
Robert Henry
v.
United Overseas Marine Corporation
Robert Henry, Appellant

SUR PETITION FOR REHEARING

Present: Seitz, Chief Judge, and Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, and Garth, Circuit Judges, and Knox, District Judge.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) Aldisert
Judge

Dated: February 2, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1618

Helen Henry
Robert Henry

v.

United Overseas Marine Corporation
Robert Henry, Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 73-1613)

Argued January 6, 1977 before: Aldisert and Weis, Circuit Judges, and Knox, District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, and for the reasons set forth in the district court oral opinion by The Honorable Alfred L. Luongo on

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*Honorable William W. Knox, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

March 12, 1976 (as set forth at pages 42a-53a of the joint appendix)[1], it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,
(s) Aldisert
Circuit Judge

Attest:

(s) Thomas F. Quinn
Thomas F. Quinn, *Clerk*

Dated: Jan 6 1977

Certified as a true copy and issued in lieu of a formal mandate on February 10, 1977.

Test:

Thomas F. Quinn

Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellee as follows:

Brief $666.00

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[1] See also *Brown v. Rederi*, —— F.2d —— (No. 76-1037) (3d Cir., Nov. 4, 1976).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-1613

Robert Henry

v.

United Overseas Marine Corporation

CIVIL JUDGMENT

Before Honorable Alfred L. Luongo

AND NOW, this 12th day of March 1976, in accordance with civil jury trial, and the Court having GRANTED defendant's motion for directed verdict,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendant United Overseas Marine Corporation and against plaintiff Robert Henry, together with costs.

By the Court:

Attest: (s) Lee V. A. Yates
Deputy Clerk

Civ 1 8/75

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-1613

Robert Henry

vs.

United Overseas Marine Corporation

Philadelphia, Pennsylvania

March 12, 1976

Before: Hon. Alfred L. Luongo, J.

ARGUMENT ON MOTIONS

THE COURT: All right, in the matter of Henry versus United Overseas.

MR. SHUSTER: If Your Honor pleases, so that Your Honor may be in the appropriate procedural posture to decide the matter now pending before you, Mr. White and I have agreed that Your Honor may proceed as if a jury had been empaneled in this matter and heard

the evidence which will be presented to you upon which Mr. White is going to make his motion.

MR. WHITE: And I certainly agree with that procedure, Your Honor.

THE COURT: All right. Then we will assume for this purpose that the jury had been empaneled and you may now proceed.

MR. SHUSTER: If Your Honor please, at this time I would like to formally offer into evidence the stipulation and supplemental stipulation of the parties which are already filed of record.

THE COURT: And they are marked and docketed as Documents Nos. 43 and 44.

MR. SHUSTER: With that, sir, the plaintiff rests.

THE COURT: All right. Mr. White.

MR. WHITE: Thank you, Your Honor.

THE COURT: Before you make the argument, you have a motion?

MR. WHITE: Yes. I would come up to the microphone and make the motion.

THE COURT: Just for the moment make the motion from there and then I want to make a brief statement.

MR. WHITE: Your Honor, pursuant to Rule 50 of the Federal Rules of Civil Procedure, the defendant moves for a directed verdict at the conclusion of plaintiff's evidence.

THE COURT: I am agreeable to proceed in the fashion requested by counsel since the stipulation which

has been filed contemplates filing a motion for directed verdict under Rule 50 by the defendant, and the stipulation proceeds further to provide that in the event the Court denies the defendant's motion for directed verdict, in such case judgment is to be entered by agreement for the plaintiff, Robert Henry, against the defendant in the amount of $30,000. It is clear, therefore, that the parties have covered every contingency for the function of the jury, and I am, therefore, agreeable to proceed in this fashion. And, Mr. White, you may now argue your motion.

MR. WHITE: Thank you, Your Honor.

If Your Honor please, as a result of a stipulation that has been entered into between the parties, there is certainly no credibility issue in this case.

Defendant's motion for directed verdict is basically premised on two principles: Namely, that on the stipulated set of facts, as a matter of law defendant owed no duty to plaintiff in this matter. That is for Your Honor to decide, whether the facts as stipulated give rise to a duty owed by the shipowner to plaintiff longshoreman under the 1972 amendments to the Longshoremen and Harborworkers' Act.

Secondly, if Your Honor construes the duty more broadly than defendant would like that duty to be construed, defendant takes the position again that plaintiff must prove every element that is a part of his proof under the duty that Your Honor arrives at. And if one sine qua non has not been established by the evidence as represented in the stipulation, then defendant asserts that it is entitled to a directed verdict as a matter of law.

I would like to address myself initially to the duty that the shipowner owes to a longshoreman under the amendments, and secondly to the matter of proof based principally on the arguments relied on by plaintiff in his brief.

As Your Honor knows, as a result of being on the panel in Lucas I, the purpose of the 1972 amendments was to take away the warranty of seaworthiness to the plaintiff longshoremen and to remove the shipowner's action for indemnity against the stevedore. The reasons and purpose have been set forth in a number of opinions and I do not intend to go into that in any great detail except to say that the quid pro quo for the shipowner under the amendments was not only the abolition of its right to indemnity against the stevedore, but a narrow standard of care under the negligence action which Congress still permitted. This narrow standard of care, of course, is pursuant to land based principles. That, I think, has been rather well established by the opinions that have addressed this issue in the past two and three years.

I realize that by analogizing to land based principles the Court is not bound by any particular law of any particular state. The Court can refer to land based principles, be governed by land based principles, and yet in effect establish a Federal admiralty common law. But certainly Congress intended the courts to be guided by common law or land based principles.

With that brief background I would refer to three —or two, at any rate, possibly three important facts in the stipulation that I think are crucial in determining the motion.

The first crucial fact is that the shipowner in this case did not engage the stevedore. That engagement was made by the time charterer of the vessel, and the time charterer is not a party to this lawsuit. There was no contractual relationship between the shipowner and the stevedore.

The second fact that is rather clear from the stipulation is that the stevedore was negligent in the manner in which they discharged the bales of sisal. They pulled out intermediate tiers causing the topmost tiers to be unsecure, and as a result of doing this a bale fell and struck Mr. Henry.

The third factor from the stipulation that I think is crucial is the fact that the shipowner, through its third officer and its chief officer, had knowledge of the method being used by the stevedore. The legal question, therefore, is what effect, if any, does that knowledge have in terms of liability to the shipowner. And defendant submits it has no effect whatsoever, and does not give rise to any duty.

We have stipulated that the knowledge that existed was actual knowledge. For purposes of legal argument, actual and constructive knowledge are the same. So it would make no difference whether the third officer and the chief officer did not have actual knowledge, but that the condition existed long enough that they would have constructive knowledge. It makes no difference. The two, for purposes of argument, are considered in the same boat, and, again, defendant asserts there is no liability on the basis of that actual or constructive knowledge.

It is our position that the defendant shipowner, once it turns over the vessel to a stevedore, is obligated to have the vessel in a reasonably safe condition so that the stevedore utilizing its expertise can stevedore the vessel in a safe manner. Once that is done there is no liability to the shipowner for anything that happens subsequently as a result of the improper method of stevedoring that is being utilized by the stevedore through its employees and supervisory personnel. This is consistent with numerous state and Federal cases.

In my brief I have pointed out the case of Fisher versus United States, which was a decision from this circuit, applying Pennsylvania law. I have referred to the numerous Pennsylvania cases on the point which all held that once a landowner—and we are using the landowner as the analogy for the shipowner—once the landowner turns the work over to an independent contractor and exercises no control over that independent contractor in terms of the methods utilized by that contractor, there is no liability for an improper method or an unsafe condition created by that independent contractor through its employees.

Fisher, of course, involved the United States of America. It was a construction site accident where the Government had safety inspectors on the job site, and the court held that the Government, through the personnel it had on the job site, was not liable for any injury to an employee of an independent contractor, notwithstanding that the safety inspectors and supervisors of the Government knew or should have known of the dangerous condition which ultimately caused the accident. We have precisely the same situation in this case.

The chief officer and third officer were, of course, employees of the shipowner, but under Fisher, and the cases relied on by Fisher, there is no legal duty to do anything; there is no duty created between the employee of the independent contractor and the landowner, even with knowledge. And I think this is an accurate reflection of realities in the modern business world. A shipowner comes into the port, in this case the Pacific Breeze was a Chinese vessel. It is really unrealistic to assume that a foreign shipowner operating through a foreign crew is going to be able to do anything to upgrade the safety program of a stevedore when the stevedore utilizes an improper method; unrealistic in terms of a foreign shipowner-stevedore relationship.

The stipulation concedes that the stevedore was negligent. The stipulation includes that the stevedoring supervisory personnel knew that the method being used was improper. If they knew it already, isn't it superfluous for the shipowner, through its crew members to say anything to them: "Hey, you are using an improper method." It is an exercise in futility. They are telling them something they already know and, therefore, no legal duty should be created.

In the last part of the stipulation, the original stipulation, there are pointed out four things that the shipowner didn't do, and that has been admitted. The shipowner didn't request Northern Metal Company to change the method. But there is no evidence in the stipulation that such a request would have been acted on. Therefore, how can it be a proximate cause of the accident, and plaintiff, of course, has the burden of proof on proximate

causation. He has to introduce sufficient evidence upon which reasonable men might conclude that the failure to make a request was the proximate cause. There has been no such evidence entered into the record.

Secondly, the stipulation says that there was no suggestion made to Northern Metal by the shipowner that they change their method. The same argument holds true with the failure to make a suggestion. There is no evidence that any suggestion would have been followed and, therefore, as a matter of law it cannot be the proximate cause of the accident.

Thirdly, the stipulation contains the fact that there was no order made by the shipowner to the stevedore to change its method of discharge. Again, the stipulation doesn't contain any facts that such an order would have been followed. Indeed the shipowner didn't even contract with the independent contractor. That was done by the time charterer.

The final point that is made is that the shipowner did not stop the discharge until such time as the method was changed. There is no question but that the shipowner had it within its power to do that. They could have turned off the electrical supply to the winches and stopped the discharge procedure.

Comment D, I believe it is, to Section 14 of the Restatement of Torts, covers that precise situation when it deals with the issue of control of an independent contractor by a landowner.

THE COURT: Section 14?

MR. WHITE: Section 414 of the restatement, and it is Comment C to that section where it states, "It is not enough that he—" referring to the employer of an independent contractor—and I am not suggesting that the shipowner is an employer of an independent contractor, because they didn't contract with the stevedore in this case, but they are referring to an employer of an independent contractor when they say, "It is not enough that he has merely a general right to order the work stopped or resumed to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations or deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work as to operative detail."

It is defendant's position that even though ultimately the shipowner could have cut off the power to the winches, that that does not create a duty upon the shipowner to do so, and certainly does not give the shipowner the necessary control over the methods of work of the independent contractor, the stevedore in this situation, to impose a duty.

On the issue of control, plaintiff's brief by and large relies upon pre-1972 cases, Maritime cases, and it is primarily addressed to the issue of control. And the argument is made that there are sufficient facts in this stipulation, and in the supplemental stipulation, which a jury could conclude, or could infer that the shipowner had control over the stevedoring operation. Defendant contends that there is no sufficient evidence, and I refer to Comment C of Section 414; I refer to Fisher versus Unit-

ed States, where there were two or more personnel from the Government on the job site; I refer to Hader; I refer to Crane; I refer to Brletich; I refer to Sylvania—Moore versus Sylvania Products, all of which, as a matter of law, refused to impose a duty on the landowner for negligence of the independent contractor.

Thank you, Your Honor.

THE COURT: Thank you, Mr. White.

MR. SHUSTER: If Your Honor please, I hopefully will be very brief. I just want to make a couple of points because I know Your Honor has had the briefs and is aware of what they contain. I would just like to state the issue simply, sir, or differently.

If Your Honor please, as I see the issue, I see it slightly differently than Mr. White. I see what is before you, as Your Honor looks at the 1972 amendment and tries to fashion what Congress intended the Federal Courts to do, whether this stipulation and the reasonable inferences therefrom, creates a jury question which Your Honor otherwise would have to present to a jury for them to determine whether or not the shipowner in this case was negligent or not. And in this instance, sir, briefly summarized, what the stipulaiton indicates is that the shipowner's winches and gears were used, that their employees knew of a dangerous condition, knew the dangerous condition was persisting, knew that the stevedore was not changing that dangerous condition, had a way of stopping it and did nothing. And it seems to me in light of the history of the Act that says the shipowner too has to participate in accident prevention under circumstances when

they know of a dangerous condition, that this at least creates a jury question in terms of the stipulation, the reasonable inferences.

I just want to make one comment about what—actually two comments about what Mr. White said. One is a question of a foreign shipowner coming into this port. I think it is obvious when a foreign shipowner comes into this port he is subject and has to be bound by the laws of the United States; he takes advantage of the courts of the United States. As far as the question of proximate cause as to the first three items of 42-A, B, and C, Mr. White has argued that there is no indication in the stipulation had these things been done, that is suggesting to change the method that in fact this would have been done. This may be a minor technicality, sir, but I would just like to point out to you that in stipulation number 38, it indicates that it was the ship boss and the gang boss who had to approve the method and, therefore, were aware of it. The ship superintendent was aware of the proper method, and there was nothing in the stipulation that he was actually aware of the fact that this improper method was going on and he, of course, being a superior to these two men, a jury could then infer had this been brought to his attention he would have seen to it that people under his supervision would have corrected it.

THE COURT: Just a minute. What about stipulation number 28?

MR. SHUSTER: Yes, sir. The supervisory employees, I think if you look at 28 with 38 you get which supervisory employees you are talking about.

THE COURT: I am sorry. All right.

MR. SHUSTER: Well, sir, if I lost on that one, sir, in terms of what the inferences are, in terms of proximate cause, it seems to me you get down to the basic question that they did have the ability to stop the method. There is no question about that as far as proximate cause is concerned. That is all I have to say, sir.

THE COURT: I can understand that counsel have made a very conscious effort to try to devise a procedure which will guarantee appellate review of a fact situation so that we can begin to fill in the outlines of the obligation of the vessel owner under the 1972 amendment to the Longshoremen and Harborworkers' Act.

Under normal circumstances I believe I would have accommodated counsel and filed a written, and perhaps lengthy, and hopefully scholarly opinion, setting forth my reasons for what I am about to do. But I think that the factual situation in this case, as defined and limited by the stipulation of facts filed by counsel, renders this case of relatively minor significance in the overall pattern of the cases which will ultimately define the outlines of the shipowners' obligations as they relate to cargo operations.

I will start at the end, or perhaps we will call it the beginning because if indeed a jury were here in the jury box, the beginning and the end would be the same. I grant the defendant's motion for directed verdict. That would be all I would say if a jury were in the box and leave it to counsel to do something at a later stage. But I think that the circumstances here require some exposition, albeit brief, of my views, and the considerations that

have caused me to direct the verdict in favor of the defendant.

Northern Metals Company, the stevedore, and plaintiff's employer, is clearly, by any definition, an independent contractor hired to discharge cargo. Indeed in this case Northern Metal was not even hired by the vessel owner. It was hired by the time charterer of the vessel. I make no great issue of that. That is not the important element here.

What is important is that there is no evidence in this stipulation which has been submitted to the Court that the vessel owner, or the charter party retained any right to control the method and manner of doing the work. I have no idea whether under other factual circumstances, or other types of evidence that might be presented, custom of the trade, or otherwise, there might be some evidence of the degree of control retained by a vessel owner of the precise manner and method of doing the work for which the stevedore, presumably an expert, was engaged to perform.

The only evidence in this stipulation, that which relates to the checking of the cargo holds by the chief mate and the third mate where work was being performed, is consistent with the vessel owner's checking of the progress and results of the work, much as the role performed by the safety inspectors in Fisher versus United States, one of the cases relied upon by defendant, 441 Fed. 2d 1288, Third Circuit (1971).

In plaintiff's brief—not so much in the oral argument here today, but in the brief—plaintiff has argued that there is a fact question as to whether the shipowner rea-

sonably should or should not have expected the stevedore to change the method of discharge. And the stipulation does provide that there is no evidence that any request, or suggestion, or even an order to change the method of work was made.

On the other hand, as defendant has pointed out, there is no evidence that had such a request or suggestion, or order been issued, that it would have had any effect. And this, again, goes back to the earlier statement that I made, that there is nothing in the evidence before me to indicate that the shipowner retained any right to control the method and manner of performing the work.

I can envision situations in which the method used by the independent contractor creates such a high degree of risk and danger to persons, and property, as to justify the extreme measure of cutting off the power to the winches. But this is not such a case. I can envision a case, for example, where the independent contractor's personnel has come aboard and it becomes obvious in short order that they have broken into the bonded cargo and have drunk themselves into a state of intoxication, and in some fashion show a complete lack of control and a degree of conduct, or lack of control as to create a serious danger that would require a vessel owner to take the extreme measure and put a halt to the operations.

I do not accept the argument made by plaintiff's counsel that the control over the power source is the kind of control that makes the shipowner liable for the acts of the independent contractor. I shudder to think that if I, as a home owner, hired an independent contractor, and that independent contractor makes use of my source of

electricity, my source of water, and that that will be interpreted, the fact that he does make use of them, would be interpreted as a measure of control on my part over the method and manner in which he performs his work, is unthinkable. And I reject the fact that the vessel owner has control over the power source to the winches as a basis for concluding that the vessel owner has the right to control the manner and method of the work performed by the stevedore.

In my view, Congress intended to relieve the vessel owner of liability for the negligent performance by the stevedore of the work which the stevedore was hired to do. Congress did intend to make the vessel owner liable for its own independent acts of negligence, not for the vessel owner's failure to correct the stevedore in what the vessel owner regarded as an improper method of doing work the stevedore was hired to perform.

There are many acts of negligence for which a vessel owner may be liable, as for example, oil on the deck placed there by the carelessness of ship's personnel, or oil on the deck pre-existing the arrival of the stevedores. And, incidentally, the oil on the deck I believe was an illustration used in the legislative hisory of the 1972 amendment; or a loose step about which the stevedore might not become aware when the stevedore comes aboard to do the work. I agree that there is liability and should be liability, and I believe Congress intended that there be liability for such independent acts of negligence on the part of the vessel.

Counsel for the plaintiff has submitted the opinion in Marant versus Farrell Lines, Inc., Civil Action 73-2615 in

this Court, as reflecting the view that in the Lucas case, the three-judge panel of this Court, of which I happened to be a member, intended that there be concurrent negligence on the part of the vessel owner and the stevedore. My interpretation of the Lucas language differs from the Judge who wrote the opinion in Marant.

In my view, Lucas simply intended to refute the argument by the counsel for the vessel owners in Lucas, that Congress intended there to be liability only if the negligence of the vessel was the sole cause of the accident. My interpretation of Lucas is that it is possible for there to be independent causes of an accident which can join together, in which case there could be fault on the part of the stevedore and there could be fault on the part of the vessel, in which case the vessel will be responsible and liable if it independently was at fault. But I do not believe that it is a proper interpretation of Lucas to regard as concurrent negligence the failure of the vessel owner to correct the negligent act on the part of the stevedore in the performance of his duties. In that respect I differ with the Marant court.

I add a word, simply as further reason for my conclusion. To adopt the interpretation advanced by plaintiff in this case, would be to create chaos in stevedoring operations.

If the vessel owner were placed in the situation of having to correct an improper method of operation, imagine what would happen in the course of operations: The chief mate observes a certain method and he then gets into a dispute with the gang boss, and thereafter the superintendent and the ship boss over what is or what is not

the proper method of operation. They may disagree as to whether the operation being performed by the stevedore is a proper or an improper one. I recognize that that is not the fact here. It is stipulated that everyone was aware that this was not a reasonably safe method. But I am simply speaking now to what Congress contemplated by this.

Query: Would this call then for a stoppage of work while they then call for an arbitrator to decide who is right as to what is the proper method of operation? Certainly the facts of life in the commercial world would not accept that as a viable alternative to placing the control of the method of operation on the person who was engaged to perform that kind of work with the limited reservation that I expressed earlier, when the conduct of the stevedore reaches a certain stage, then any reasonable person would have to, even at the extreme expense of the cost of shutting down operations, have to shut down operations. As I said, I do not think that this is such a situation.

There were several other thoughts that occurred to me, but I cannot think of them at this moment.

One of the things that I did want to express, I am aware of the various standards that have been espoused in a number of the cases. This case does not call upon me to say what standard should be applicable ultimately. On this fact situation I am simply noting that I could not submit to a jury and have them speculate on these issues of control.

I am not at all certain that those cases which have equated the vessel owner's responsibility under the 1972

amendment to a land based landowner's obligation to the workmen of an independent contractor will ultimately be the test applicable in this Federal common law relating to vessel owner and longshoremen. My own personal view is that in the course of time there will develop a Federal common law which will be peculiar to the relationship between vessel owner, stevedore and longshoremen. It will be as Congress mandated, a uniform Federal law. It will not be bound to any particular state law or state theory, but I think what will ultimately emerge at the very least is that the vessel owner will not bear the responsibility for failing to tell the stevedore how properly to perform his duty.

(Off the record discussion.)

THE COURT: Interestingly, one of my colleagues on the three-judge panel on the Lucas case, Judge Huyett—indeed he was the author of the Lucas opinion—in the case of Shields, et al. versus A. P. Moller, Civil Action No. 74-1032, i.. a nonjury trial on January 23, 1975, ruled that there was no liability on the part of the vessel owner for bringing aboard a gas forklift truck into a hold in which there were no ventilators where ship's personnel on the main deck apparently were present when the forklift truck was taken aboard.

I was looking through the transcript here to see if I could find any specific comment. I can only say that one of Judge Huyett's conclusions of law, as reflected in the transcript, is that there is no retention of control by the shipowner of the work performed by the stevedore company. Next, since there was no retention of control by the defendant shipowner, there was no duty on the part

of the defendant to protect the plaintiffs against the equipment of their own employer, which equipment had been brought on the ship by the plaintiff's own employer, and found that there was no negligence on the part of the vessel owner under those facts.

He added this comment: "May I say that I believe that it would undermine and be completely contrary to the congressional purpose of the 1972 amendments to hold a shipowner liable where the stevedore company had complete control of the work being done and where the stevedore company had brought the gas forklift truck on board, which was the equipment involved in this case, and directed its operation, and of course where the ship had no notice or knowledge of the allegedly dangerous condition." I note that last statement of Judge Huyett's, of course, is a complete distinction from the facts before me where it is stipulated that the shipowner does have knowledge. But I thought it would be interesting, in any event, to get the reaction of the author of the Lucas opinion to his theory of liability.

I have not undertaken to list the various cases by name. Counsel have set them forth in their briefs: The Hite case, the Frasca case, and all of the rest of them, including the one cited by Mr. Shuster. But, as I say, I don't think that this is an appropriate case to go into an extended exposition as to what the ultimate standard will be. I conclude only that the shipowner has no liability for failure to correct the kind of improper work that was taking place on this vessel on the day in question.

MR. SHUSTER: If your Honor please, for purposes of clarification of the record, do I gather from Your

Honor's ruling that Your Honor is rejecting the principles that were stated in Fisher versus United States, and Ferrante, and the line of pre-amendment cases—

THE COURT: You don't mean Fisher versus United States. You mean Fisher versus Norships.

MR. WHITE: I think he means Fisher versus United States Lines Company.

THE COURT: Just a moment. I thought you were referring to—well, maybe it is referred to by the name "Fisher versus Norships".

MR. WHITE: That is Judge Davis' opinion.

MR. SHUSTER: I am talking about Wallace Fisher, sir.

THE COURT: (Pause.) Oh, yes. Yes. I am aware of all of the cases cited in your brief. I have read them all carefully. I am saying that the new Act effects a change, and whatever the pre-1972 law was, I think Congress meant it when it said that the vessel owner shall not be liable, or vice versa—I guess it is the stevedore shall not be liable directly or indirectly for the negligence of somebody else. And I believe they meant the other to be true also.

MR. SHUSTER: Thank you, sir.

One other matter of clarification. Can I also assume, based on Your Honor's ruling, and in reference to the other Fisher case, that Your Honor has considered the principles as stated in the Restatement of Torts 343 and 343-a—

THE COURT: I have considered all of those. I am not called upon to rule in this case precisely whether if those cases had been applicable—or rather if the facts in this case warranted I would have applied 343 and 343-a to this case. I have said to you that I do not think any one specific brand or style, or principle, or statement of land based law is going to outline the duty of the vessel owner. I simply said that on the facts of this case—and that, remember, is my ruling, I direct a verdict in favor of the defendant.

MR. SHUSTER: Yes, sir.

THE COURT: Everything else I said was pure dictum.

MR. SHUSTER: Yes, sir.

On the question of proceeding, I would like to call Your Honor's attention to a matter which is now pending before the Court of Appeals. As I understand it, at the present time there is pending before the Court of Appeals the case—and I will spell the plaintiff's name, it is rather difficult to pronounce—it is Z-u-k-a-u-s-k-a-s versus Society, it is a foreign company, it is Appeal No. 74-166 in the Court of Appeals. Briefing has been completed and I understand it is scheduled for oral argument sometime this month in which the issue presented is, to the Court of Appeals for the first time, what is the duty for negligence in the post-1972 era.

Now at this point, Your Honor, as I see it, there are two options available to me, and I would like, if Your Honor would have no objection, to give me your feelings. And one is to go directly to the Court of Appeals, the oth-

er is to file a motion for a new trial with you and ask you to hold that in abeyance pending—

THE COURT: I will give you an answer immediately. Go directly to the Court of Appeals. I doubt seriously that whatever that case is on appeal it is going to rule all the rest of the cases. If you decide, after you have taken the appeal, and if the Court of Appeals comes down and its ruling is such that it will change everything, maybe Mr. White will agree that the appeal be withdrawn by agreement and you come back and we would agree then to have judgment entered in your favor rather than wait and have it reversed on appeal. But why waste time? This is a very short record, extremely short. You have a stipulation and your notice of appeal. That is your whole record, plus the transcript of what was said in this oral argument. That is the whole record, is it not?

MR. SHUSTER: Yes, sir.

THE COURT: I cannot think of a cheaper, easier case to appeal than this one. Maybe a bad case to appeal, but nevertheless I cannot think of a cheaper or easier case to appeal. In the meantime, if the Court of Appeals rules in the Zukauskas case in such a fashion that makes it abundantly clear that I am wrong, Mr. White, I am sure, is a reasonable man and I will agree to a withdrawal of the appeal and pay your $30,000. It is as simple as that.

One thing is certain: The Court of Appeals will not send this case back to me for retrial. It will either affirm me or reverse me, in which case it will direct, or it will return it to me with a direction to enter judgment in

your client's favor for $30,000. So anything else we do would be simply a marking of time and wasting of time.

MR. SHUSTER: All right, sir.

THE COURT: I suggest instead that you file your notice of appeal.

MR. WHITE: If Your Honor please, I would simply, for the record, ask you to enter judgment on the directed verdict.

THE COURT: Yes. There is no reason why judgment should not be entered, no reason whatsoever for motions for new trial in a case submitted on stipulations. I am either right or I am wrong.

I direct the judgment be entered on the directed verdict in favor of the defendant, United Overseas Marine Corporation. And, I take it, that will be accomplished in the course of the day.

MR. SHUSTER: Thank you.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1520

ROBERT HENRY and HELEN HENRY, *h/w*
Petitioner

v.

UNITED OVERSEAS MARINE CORPORATION,
Respondent

RESPONSE OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

ROBERT B. WHITE, JR.
Counsel for Respondent

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ARGUMENT

The Petition Should Be Granted.

The essence of the Petition for a Writ of Certiorari in this case is that the Third Circuit Court of Appeals "has decided an important question of Federal law which has not been, but should be, settled by this court." The quoted language, of course, is from Rule 19(b) of the Rules of this Honorable Court. While there is disagreement between petitioner and respondent on the merits of the decision reached by the Third Circuit Court of Appeals, there is no disagreement that the issues involved raise important questions of admiralty and maritime law which should be settled by this Court.

The issues involved here require construction of the 1972 amendment to 33 U.S.C. §905 which was the addition of subsection (b). Section 905(b) is recited at page 4 of the Petition. The interpretation required by this Honorable Court involves the standard of care Congress intended to impose on shipowners *vis a vis* longshoremen working aboard their vessels.

Recently, in *Northeast Marine Terminal Co., Inc. v. Caputo*, 45 U.S.L.W. 4729 (June 14, 1977), this Court began the task of construing those provisions of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act that have generated controversy in the inferior federal courts. In *Caputo*, this Court construed 33 U.S.C. §902(3). Respondent submits that the instant case presents an excellent vehicle for this Court to continue the task begun in *Caputo*. Should the Court grant the Petition for Certiorari and settle the standard of care issue under 33 U.S.C. §905(b), the substantial controversial questions raised by the 1972 Amendments will be resolved.

At this juncture, almost five years after the effective date of the 1972 Amendments, there have been numerous decisions interpreting 33 U.S.C. §905(b). Accordingly, this Court has the benefit of the exhaustive analyses of these inferior federal courts. To deny the petition herein will leave the standard of

care issue unsettled to the detriment of both longshoring and shipping interests. Conversely, no advantage will be gained by this Court deferring a decision on the standard of care issue.

CONCLUSION

For the reasons stated herein, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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